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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS AVERY DALLAS, Defendant and Appellant.	E043786 (Super.Ct.No. SWF014700) **OPINION**

APPEAL from the Superior Court of Riverside County. Albert J. Wojcik, Judge. Affirmed.

Rex Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela Ratner Sobeck, Supervising Deputy Attorney General, David Delgado-Rucci and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.C and III.

Defendant Thomas Avery Dallas phoned his girlfriend while she was out and told her that her nine-month-old son had been hurt. The next day, the baby was found to have two skull fractures. (Fortunately, he recovered fully, with no permanent injuries.) Defendant claimed that the girlfriend's older son had hit the baby in the head with a plastic toy airplane; there was considerable evidence, however, that this was not true.

The trial court, citing Evidence Code section 1109, also admitted evidence that defendant had committed previous acts of domestic violence against a former girlfriend and previous acts of child abuse against that former girlfriend's child.

A jury found defendant guilty on two counts:

Count 1: Felony infliction of an injury on a child. (Pen. Code, § 273d, subd. (a).)

Count 2: Felony child abuse. (Pen. Code, § 273a, subd. (a).)

In connection with each count, it found true an enhancement for personally inflicting great bodily injury on a child under the age of five. (Pen. Code, § 12022.7, subd. (d).) Defendant was sentenced to a total of 12 years in prison.

In the published portion of this opinion, we will hold that, because defendant lived with the baby, this was not only a prosecution for "child abuse" so that prior acts of child abuse were admissible under Evidence Code section 1109, subdivision (a)(3), but also a prosecution for "domestic violence" so that prior acts of domestic violence were likewise admissible under Evidence Code section 1109, subdivision (a)(1).

We will further hold that, because prior acts of child abuse were admissible in connection with count 1, the jury was also entitled to consider them in connection with count 2.

In the nonpublished portion of this opinion, we find no other prejudicial error. Hence, we will affirm.

I

FACTUAL BACKGROUND

A. *Evidence of the Charged Crimes*.

Defendant was living with his girlfriend Jessica ("Jessie") P. and her three sons — seven-year-old S.P., four-year-old K.P., and the nine-month-old baby — at Jessie's home in Temecula.

Around July 2005, the baby started to seem "nervous" around defendant. For example, if Jessie walked into the room when defendant was holding him, he would turn and grab for her. In the morning, when he woke up, if defendant picked him up, "[h]e would scream as if he were being hurt."

On the night of August 5-6, 2005, Aimee Cunningham and her boyfriend Raymond Padilla visited defendant and Jessie. Defendant suggested going to the nearby Pechanga Casino. Around 11:30 p.m., however, because Cunningham and Padilla had been drinking, the couple went to sleep. Defendant then said that he could not go to the casino because he wanted to finish a video game and take a shower. Thus, around 1:00 a.m., Jessie went to the casino by herself.

Sometime during the night, when Padilla was half-awake, he heard somebody crying; he then went back to sleep.

Around 2:30 or 3:00 a.m., Jessie received "an emergency page . . . ." When she called home, defendant told her that the baby was hurt and that K.P. was also involved. He did not sound concerned.

When Jessie got home, K.P. was asleep. Defendant was holding the baby. The baby was not crying. When defendant handed the baby to Jessie, she immediately noticed swelling on one side of his head. Defendant explained that he heard the baby crying; he went to the baby's room, where he found K.P. hitting the baby in the head with a plastic toy airplane. Defendant specifically said the baby was in his crib. He also said that he felt K.P. was sleepwalking.

Jessie said they should take the baby to a hospital. Defendant said that was not necessary and would only "get CPS on our ass." Jessie looked up head injuries in a baby-care book; it said to call a doctor if the baby showed "sleepiness, . . . bruising in and around the eyes and ears, [or] a soft spot on the head." The baby did not display any of these symptoms, so she did not insist on getting medical care for him.

The baby would not go back to sleep, so Jessie sat up with him. When she took him to his room, defendant followed her in. He seemed to scan the room; he then pointed to a child's "activity center table" and said that K.P. had been standing on it. Jessie thought it was odd that he had not mentioned the table before. It was standing upright where it normally stood, about 10 feet away from the crib. The legs of the table always left C-shaped impressions in the carpet. Jessie looked for these impressions near the crib but could not see any. Also, the airplane was normally kept in S.P.'s room, under his

bed. In Jessie's opinion, it would have been impossible for K.P., while sleepwalking, to get the airplane out from under the bed, climb on the table, and hit the baby with it.

Jessie testified that, as far as she knew, K.P. did not sleepwalk. Also, she had never known him to be violent with his brothers or any other children. She admitted that, shortly after she separated from her husband, she found K.P. and another child tossing a kitten back and forth; the kitten had a bloody nose, but it survived. As a result, she placed K.P. in therapy. He seemed to respond well and had not shown any "inappropriately aggressive behavior" since then.

The next morning, defendant told Padilla that one of the children had hit the baby with a toy. He pointed to the living room floor.

Around noon, Jessie noticed that the baby's head felt "squishy" and that there were bruises in his ears. She took him to a medical center. X-rays taken there revealed that he had a skull fracture. As a result, he was taken to a hospital, where he was examined by Dr. Marilyn Kaufhold. Dr. Kaufhold is a forensic pediatrician and an expert on child abuse.

A CT scan showed that the baby had bilateral skull fractures — both parietal bones, on opposite sides of the head, were fractured. The fractures were "long" and "went down the side of the head." The one on the right was "a little bit longer" than the one on the left. The scalp over both fractures was swollen, particularly on the right side, which was why the baby's head felt "squishy." The swelling meant that the fractures were "relatively fresh," as such swelling would go down "within several days to a couple [of] weeks."

The baby also had a number of bruises. First, he had a bluish bruise in the left ear, just outside the ear canal. He had another bluish bruise behind the right ear.[1] He had a yellowish-brown bruise above the right eye and a similar bruise right between the eyes.[2] He had several bruises on his back and side. He had a brownish bruise on his left arm. Finally, he had a brownish bruise on his right thigh. Dr. Kaufhold testified that, while "[i]t's not possible to date bruises very accurately," the bluish bruises to the ears were probably more recent than the others.

According to Dr. Kaufhold, a child of the baby's age can get a skull fracture several ways. The most common is in a fall; a fall of as little as a couple of feet, onto a hard surface, can produce a skull fracture. "[A]bout one percent of children who fall striking their head will get a skull fracture." The next most common way is in an automobile accident.

Bilateral skull fractures, however, "are much less common." They do not normally result from "a simple fall . . . ." Rather, they are associated with either a "high velocity impact[], such as in an auto accident or a fall from a greater height," or "a crush force, such as an automobile rollover [or] a head being caught in a vi[s]e of some kind . . . ." They could also result from two separate impacts.

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[1] This particular bruise could have been due to seepage from a skull fracture, rather than a "direct impact."

[2] Jessie told medical personnel, and later testified, that the baby had gotten these particular bruises by accident — one when he pulled down on an oven door, and the other when one of his brothers opened a door, unaware that he was on the other side.

Dr. Kaufhold had never heard of a four-year-old inflicting similar injuries on a baby. She found it "very improbable" that K.P. hit the baby with the airplane while sleepwalking, partly because it is "unusual" for a person to sleepwalk once and only once and partly because, even if K.P was standing on the activity table, he was not tall enough to reach into the crib and strike the baby with any force.

She admitted that the toy airplane was heavy enough to cause a skull fracture, if swung hard enough; in that event, however, she would have expected to see localized, depressed fractures, unlike the long, flat fractures the baby had. Also, it would be unlikely that this would cause bilateral fractures — "that you could do it twice and the other time be on the . . . other side of the head . . . ."

By the time of trial, the baby had recovered fully from his injuries, with no lasting impairments.

B. *Evidence of Prior Acts of Child Abuse and Domestic Violence*.

1. *Scalding J.S.'s Genitals*.

Crystal S. was defendant's former girlfriend; she had lived with him and was the mother of one of his children. J.S. was Crystal's son by a different father. When Crystal was living with defendant, J.S. was four years old.

J.S. testified that, on one occasion, when he was drawing a bath, defendant came into the bathroom, grabbed J.S.'s penis, pulled it under the hot running water and held it there. It felt "like it was bleeding." As a result, J.S.'s genitals were bruised for about a month.

Crystal testified that one day, when she was giving J.S. a bath, she discovered that "his balls were completely purple." She asked him what happened, but he would not talk to her about it at all. She then asked defendant what happened; he said his son had been wrestling with J.S. and had accidentally kneed him in the groin. The bruising started getting better after a week or so.

2. *Suffocating J.S. with a Trash Bag*.

J.S. testified that, on another occasion, when his mother was out, defendant put a large plastic trash bag over his head and shoulders. Defendant then pushed his head against the seat of the couch. He could not breathe. He felt "[l]ike [he] was gonna die." Finally, defendant let him go.

Crystal testified that one day, she wanted to visit her grandfather in the hospital and to take J.S. with her. Defendant "threw a big fit," so she left J.S. with him and went alone. While she was out, she got a "really bad feeling in [her] gut" and phoned home. Defendant was "really upset . . . ." He said, "I found [J.S.] in the back yard, and he was in a trash bag, and his lips were blue." He added that he had performed mouth-to-mouth resuscitation, and J.S. was okay. Nevertheless, he insisted that she had to come home immediately.

When Crystal got home, J.S. would not say anything except that he was okay. When she asked him what had happened, defendant talked over him. Defendant told her that J.S. had been trying to take a toy out of the bag when the bag "got stuck on him." He said that, when J.S. revived, J.S. asked, "Why are you kissing me[?]" Defendant "was focusing on that part, . . . trying to make it . . . a funny situation." When Crystal got

angry, defendant said, "How can you doubt what I am saying to you, I saved your son's life, he'd be dead if it wasn't for me . . . ." She wanted to call an ambulance, but defendant said if she did, they would take J.S. away from her.

3. *Holding J.S. Underwater.*

Another time, J.S. was crawling between defendant's legs in a one-foot-high "kiddy pool" when defendant pinned his head between his legs and held him underwater. He could not breathe. After about 10 seconds, defendant let him go.

4. *Choking J.S.*

Another time, defendant gave J.S. a "time-out." When defendant said the time-out was over, he picked J.S. up by the neck and choked him. J.S. could not breathe. After finally letting him go, defendant "said it was a hug."

5. *Breaking J.S.'s Arm.*

Yet another time, J.S. testified, defendant was going to throw him onto a bed but threw him into the wall instead, breaking his arm.[3] He had to wear a cast.[4] Defendant said it was an accident, but J.S. did not believe him, because he never said he was sorry. Defendant told Crystal that a friend of his "was wrestling too rough with [J.S.] and accidentally hurt him."

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[3] On cross-examination, however, J.S. testified he did not remember who broke his arm.

[4] Crystal testified that J.S. broke his clavicle, not his arm, and he wore a sling, not a cast.

6. *Squeezing J.S.*

Finally, J.S. testified, one time defendant was playing with him by throwing him onto a bed. On the second throw, however, defendant "squeezed [his legs and his body] together really hard," causing J.S. to throw up.

7. *Domestic Violence Against Crystal*.

At one point in their relationship, Crystal left defendant because "he was becoming more angry and more physical." After about a month, however, she went back to him. Things were better for about a month, but then defendant got "violent with [her] again."

There was one particular incident in which defendant became angry with Crystal; he was "screaming at [her] and throwing stuff." When she turned and walked away from him, he kicked her from behind, and she fell down. He held her down and yelled at her. When he left the room, she grabbed the phone and said she was calling the police. He came back in and "threw the phone out of [her] hand." He then got on top of her and pressed his forearm against her neck and her jaw with "all of his weight . . . ." She thought he was going to break her jaw. She was in "the worst pain [she had] ever felt."

Meanwhile, a neighbor had called the police. When they arrived, defendant ran out the back door. Crystal told the police what had happened. However, when the district attorney sought to prosecute defendant, Crystal admittedly did not cooperate. About a month after that, she left defendant and went to a domestic violence shelter.

When the incidents of child abuse happened, J.S. generally did not tell his mother about them, because he was afraid of defendant. After she left defendant, however, he did tell her about them.

C. *Defense Evidence*.

Cunningham had told the police that K.P. was a "troubled child," and she was afraid he would hurt her son. She had also told police that K.P. "was always poking at the baby," and she was afraid he might hurt him. At trial, she denied holding any of these opinions.

Jessie was originally introduced to defendant by their mutual friend, Nicole McGregor. Nicole testified that, when K.P. was three or four, he was "rough with other children," hitting, pushing and throwing mud at them. He hit Nicole's son in the stomach, knocking him down, even though the other boy was two years older than he was. He also hit Nicole's daughter "a lot."

According to Nicole, K.P. would "go into [the baby's] room a lot and rip things out of his hands and push him back." Nicole once told Jessie that K.P. had an anger problem and probably needed help.[5] Jessie became angry and defensive.

Nicole's daughter, McKenze McGregor, who was 13 at the time of trial, testified that once, she was playing with the baby in his room when K.P. ran in, knocked the baby down, and said, "Those are my toys, leave them alone."

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[5] Jessie denied this.

Another time, when the baby was sitting "propped up" on a chair in the kitchen, K.P. ran in, said, "That's my chair," pushed the baby off the chair, and sat in it himself.[6] The baby's head hit the floor.

McKenze confirmed that K.P. had once punched her brother, who was older than K.P. was, in the stomach. Another time, K.P. hit her sister, who was also older than he was. McKenze admitted, however, that she disliked Jessie "for what she's doing to [defendant]."

Jessie testified that she was no longer speaking to Nicole, because Nicole did not believe that defendant could have hurt the baby, and Nicole showed "no concern for the [baby's] well-being . . . ."

II

ISSUES RELATING TO EVIDENCE CODE SECTION 1109

Defendant raises several issues with respect to the trial court's admission of evidence under Evidence Code section 1109.

A. *Additional Factual and Procedural Background.*

In the prosecution's trial brief, it noted that it intended to offer evidence of defendant's past acts of child abuse committed against J.S. It argued that this evidence was admissible on several alternative theories, including under Evidence Code section 1109.

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[6] Jessie denied this. She added that the baby sat only in his highchair and was strapped in.

The prosecution also noted that it intended to offer evidence of defendant's past acts of domestic violence committed against Crystal S. Its trial brief, however, did not specifically explain why this evidence was admissible.

Defense counsel objected to the evidence of child abuse as more prejudicial than probative under Evidence Code section 352. The trial court overruled the objection and admitted the evidence.[7]

Defense counsel also objected to the evidence of domestic violence, arguing that it was improper character evidence, that it was not similar to the current offenses because it was evidence of domestic violence rather than child abuse, and that it was unduly prejudicial. The prosecution argued that this evidence, too, was admissible under Evidence Code section 1109. The trial court ruled that evidence of multiple incidents involving domestic violence against Crystal would be cumulative; otherwise, however, it overruled the defense objections. Thus, it allowed the prosecution to introduce evidence of a single such incident.

Over defense counsel's objection, the trial court instructed the jury with CALJIC No. 2.50.02 (Evidence of Other Domestic Violence)[8] and CALJIC No. 2.50.04 (Evidence of Other Child Abuse Offenses).[9]

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[7] It did exclude evidence of one prior instance of sexual, rather than physical, child abuse.

[8] CALJIC No. 2.50.02, as given in this case, stated: "Evidence has been introduced for the purpose of showing that the defendant engaged in an offense involving domestic violence on one or more occasions other than that charged in the case.

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"'Domestic violence' means abuse committed against an adult or a fully emancipated minor, who is a spouse, former spouse, cohabitant, or former cohabitant or person with whom Defendant has had a child or is having or has had a dating or engagement relationship.

"'Domestic violence' also means abuse committed against any of the following:

"A cohabitant or former cohabitant;

"A person with whom the defendant is having or has had a dating or engagement relationship;

"A child of the spouse, former spouse, person with whom the defendant has had a dating or engagement relationship, or a child of the male parent.

"A 'cohabitant' means a person who regularly resides in the household. A 'former cohabitant' means a person who formerly resided in the household.

"'Cohabitant' means two unrelated adult persons living together for a substantial period of time resulting in some permanency of relationship. Factors that may determine whether persons are cohabiting include, but are not limited to, one, sexual relations between the parties while sharing the same living quarters, two, sharing of income or expenses, three, joint use or ownership of property, four, whether [the] parties hold themselves out as husband and wife, five, the continuity of the relationship, and six, the length of the relationship.

"'Abuse" means intentionally or recklessly causing or attempting to cause bodily injury, or placing another person in reasonable apprehension of imminent serious bodily injury to himself or herself or another.

"*If you find that the defendant committed a prior offense in*[*volv*]*ing domestic violence, you may but are not required to infer that the defendant had a disposition to commit other offenses involving domestic violence. If you find that the defendant had this disposition, you may but are not required to infer he was likely to commit and did commit the crime of which he is accused.*

"However, if you find by a preponderance of the evidence that the defendant committed a prior crime or crimes involving domestic violence, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged offenses. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence[,] in determining whether the defendant has been proved guilty beyond a reasonable doubt of the charged crime.

"Unless you are otherwise instructed, you must consider this evidence for no other purpose." (Italics added.)

B. *Statutory Background*.

Evidence Code section 1109, subdivision (a)(1), as it stood on August 6, 2005, the date of the offenses, and as it stands now, provides: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Former Evid. Code, § 1109, subds. (a)(1), Stats. 2004, ch. 823, § 6.5, p. 4809.)

Effective January 1, 2006, the Legislature added subdivision (a)(3) to Evidence Code section 1109, which provides: "[I]n a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of

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9 CALJIC No. 2.50.04, as given in this case, stated: "Evidence has been introduced for the purpose of showing that the defendant committed an offense of child abuse, namely, a violation of Penal Code section 273d, on one or more occasions other than that charged in this case.

"*If you find that the defendant committed a prior violation of Penal Code Section 273d, you may but are not required to infer that the defendant had a disposition to commit the offenses involving child abuse. If you find that the defendant had this disposition, you may but are not required to infer that he was likely to commit and did commit the crimes with which he is accused.*

"However, if you find by a preponderance of the evidence that the defendant committed the prior offenses of child abuse, this finding is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. . . .

"If you determine an inference properly can be drawn from this evidence, this inference is one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the crime charged.

"Unless you are otherwise instructed, you must not consider this evidence for any other purpose." (Italics added.)

child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Stats. 2005, ch. 464, § 1, p. 2910.) It also added subdivision (d)(2), which provides: "As used in this section: [¶] . . . [¶] '[c]hild abuse' means an act proscribed by Section 273d of the Penal Code." (Stats. 2005, ch. 464, § 1, p. 2910.)

C. *Ex Post Facto Application*.

Defendant contends that, by admitting evidence of prior acts of child abuse under Evidence Code section 1109, subdivision (a)(3), the trial court erroneously gave that subdivision ex post facto application.

Preliminarily, we note that defense counsel never raised the ex post facto issue below. An evidentiary objection must be raised below, or it will be deemed forfeited for purposes of appeal. (Evid. Code, § 353.) This general principle applies specifically to an objection based on ex post facto principles. (See *People v. Huggins* (2006) 38 Cal.4th 175, 236.) Defendant does not contend that his trial counsel's failure to object on this ground constituted ineffective assistance of counsel. (Cf. *People v. McCary* (1985) 166 Cal.App.3d 1, 9-11.) We therefore conclude that defendant's present contention has been forfeited.

Separately and alternatively, however, we also conclude that it lacks merit. To explain this conclusion, we must begin with a brief historical review.

In the seminal case of *Calder v. Bull* (1798) 3 U.S. 386 [1 L.Ed. 648], Justice Chase enumerated four categories of ex post facto laws: "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater

than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." (*Id*. at p. 390 [seriatim opn. of Chase, J.].)

Almost two centuries later, in *Collins v. Youngblood* (1990) 497 U.S. 37 [110 S.Ct. 2715, 111 L.Ed.2d 30], the Supreme Court reiterated Justice Chase's first three categories. (*Id*. at p. 42.) In a footnote, it explained that it had omitted the fourth category because, "[a]s cases subsequent to *Calder* make clear, this language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the changes. [Citations.]" (*Id*. at p. 43, fn. 3.)

In 1995, the California Legislature enacted Evidence Code section 1108, which provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).) Evidence Code section 1108 served as the model for Evidence Code section 1109.

People v. Fitch (1997) 55 Cal.App.4th 172 then held that Evidence Code section 1108 could be applied in a prosecution for a crime committed before its enactment without violating the ex post facto clause. (*Fitch*, at pp. 185-186.) After noting that *Collins* had omitted the fourth *Calder* category, and after quoting *Collins*'s stated reasons for doing so, it concluded: "'[A] new rule of evidence which admits evidence not

previously admissible or which extends competency to a witness may validly operate in the trial of a prior offense. [Citations.]' [Citation.] [¶] Since Evidence Code section 1108 does not alter the definition of a crime, increase punishment, or eliminate a defense, it does not violate the ex post facto clause. [Citation.]" (*Fitch*, at p. 186, quoting *DeWoody v. Superior Court* (1970) 8 Cal.App.3d 52, 56.)

Defendant, however, essentially argues that *Collins* and *Fitch* are no longer good law in light of the Supreme Court's subsequent opinion in *Carmell v. Texas* (2000) 529 U.S. 513 [120 S.Ct. 1620, 146 L.Ed.2d 577]. There, a Texas statute originally provided that a defendant could not be convicted of specified sexual offenses based on the victim's testimony alone; there had to be additional corroborating evidence. (*Id*. at pp. 517-518.) The court specifically characterized this "as a sufficiency of the evidence rule, rather than as a rule concerning the competency or admissibility of evidence." (*Id*. at p. 518, fn. 2; see also *id*. at pp. 547-552.) This statute was then amended so as not to apply if the victim was under 18. (*Id*. at pp. 518-519 & 518, fn. 3.)

The Supreme Court held that applying the amendment to crimes committed before its effective date fell within the fourth *Calder* category and therefore violated the ex post facto clause. (*Carmell v. Texas*, *supra*, 529 U.S. at pp. 552.) It explained, in part: "The fourth category . . . resonates harmoniously with one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice." (*Id*. at p. 531, fn. omitted.) "A law reducing the quantum of evidence required to convict an offender is as grossly unfair as, say, retrospectively eliminating an element of the offense, increasing the punishment for an existing offense, or lowering the burden of proof [citation]. In

each of these instances, the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption; by threatening such severe punishment so as to induce a plea to a lesser offense or a lower sentence; or by making it easier to meet the threshold for overcoming the presumption. Reducing the quantum of evidence necessary to meet the burden of proof is simply another way of achieving the same end." (*Id*. at pp. 532-533, fn. omitted.) The court declined to read *Collins* as eliminating the fourth category. (*Carmell*, at pp. 538-539.)

The court added, however: "We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. Ordinary rules of evidence, for example, do not violate the Clause. [Citation.] Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case. More crucially, such rules, by simply permitting evidence to be admitted at trial, do not at all subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption." (*Carmell v. Texas*, *supra*, 529 U.S. at p. 533, fn. 23.)

Defendant argues that, like the amendment in *Carmell*, and unlike "[o]rdinary rules of evidence," the amendment to Evidence Code section 1109 is not "evenhanded"; it inevitably works to the advantage of the state, and to the disadvantage of the defendant. Although this is true, in *Carmell*, the Supreme Court considered it "more crucial[]" that the Texas amendment was, in effect, a rule regarding the sufficiency of the evidence, not the admissibility of evidence — it "subvert[ed] the presumption of innocence, because

[it] concern[ed] whether the admissible evidence [wa]s sufficient to overcome the presumption." (*Carmell v. Texas*, *supra*, 529 U.S. at p. 533, fn. 23.)

By contrast, Evidence Code section 1109 is strictly an admissibility rule; it is not a sufficiency rule. It simply does not address whether evidence of the defendant's prior acts of child abuse is sufficient to overcome the presumption of innocence. Indeed, we know from other sources of law that it is not; "propensity evidence alone cannot meet the prosecution's burden of proving the elements of the charged offense." (*People v. James* (2000) 81 Cal.App.4th 1343, 1353.) Evidence Code section 1109 "does not reduce the prosecution's burden of proving guilt beyond a reasonable doubt . . . ." (*People v. Van Winkle* (1999) 75 Cal.App.4th 133, 141 [dealing with Evid. Code, § 1108]; accord, *People v. Waples* (2000) 79 Cal.App.4th 1389, 1396-1398 [Fourth Dist., Div. Two] [same].) Hence, the amendment to Evidence Code section 1109 does not "reduc[e] the quantum of evidence required to convict an offender" within the meaning of *Carmell*. (*Carmell v. Texas*, *supra*, 529 U.S. at p. 538.)

This conclusion finds support in *Schroeder v. Tilton* (9th Cir. 2007) 493 F.3d 1083, which held that a California state court reasonably applied *Carmell* in holding that Evidence Code section 1108 could constitutionally be applied in a prosecution for crimes committed before its enactment. (*Schroeder*, at p. 1088.) It explained: "The state court did not err in concluding that § 1108 is an 'ordinary' rule of evidence that does not violate the Ex Post Facto Clause. [Citation.] The text of § 1108 does not speak to the sufficiency of the evidence it renders admissible. It simply states that evidence of prior uncharged sexual misconduct may be admitted to prove propensity. [Citation.] The rule,

'by simply permitting evidence to be admitted at trial, . . . do[es] not concern whether the admissible evidence is sufficient to overcome the presumption[of innocence].' [Citation.] Nothing in the text of § 1108 suggests that the admissible propensity evidence would be sufficient, by itself, to convict a person of any crime. Section 1108 relates to admissibility, not sufficiency." (*Ibid*., quoting *Carmell v. Texas, supra*, 529 U.S. at p. 533, fn. 23.)

Defendant nevertheless asserts that Evidence Code section 1109 does affect the prosecution's burden of proof. His argument to that effect is somewhat convoluted. He notes that, under Evidence Code section 1109, the prosecution need only prove the prior acts of child abuse by a preponderance of the evidence. (*People v. Hoover* (2000) 77 Cal.App.4th 1020, 1030.) However, evidence of the prior acts, standing alone, is not sufficient to prove that the defendant is guilty. (*People v. James, supra*, 81 Cal.App.4th at p. 1353.) This is true even if the prior acts are proven beyond a reasonable doubt.

In this case, the jury was instructed: "[*I*]*f you find by a preponderance of the evidence that the defendant committed the prior offenses of child abuse, this finding is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes*. . . . [¶] If you determine an inference properly can be drawn from this evidence, this inference is one item for you to consider along with all other evidence in determining whether the defendant has been proved guilty beyond a reasonable doubt of the crime charged." (CALJIC No. 2.50.04, italics added.)

As defendant points out, the jury was *not* instructed, "If you find *beyond a reasonable doubt* that the defendant committed the prior offenses of child abuse, this

finding is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes." He concludes that the jury, if it found *beyond a reasonable doubt* that defendant committed the prior acts of child abuse, was effectively allowed to conclude that defendant was guilty, based on that finding alone.

Preliminarily, as we have already noted, this is not the law. Hence, even if defendant were correct, he would have shown only that the trial court misinstructed the jury; he would not have shown that the amendment to Evidence Code section 1109 was given unconstitutionally ex post facto application. However, defendant is *not* correct. The crucial instruction went on to inform the jury that *any* inference that it drew from the evidence of prior acts of child abuse was only "one item for [it] to consider along with all other evidence in determining whether the defendant had been proved guilty beyond a reasonable doubt of the crime charged." (CALJIC No. 2.50.04.) This, along with the standard instruction on reasonable doubt (CALJIC No. 2.90), which was given in this case, informed the jury that evidence of prior acts of child abuse, standing alone, were insufficient to prove defendant guilty of the charged crimes.

We therefore conclude that applying the amendment to Evidence Code section 1109 to crimes committed before its enactment does not violate ex post facto principles.

D. *Prior Acts of Domestic Violence.*

Defendant also contends that the trial court erred by admitting evidence of prior acts of domestic violence under Evidence Code section 1109.

As already noted, Evidence Code section 1109, subdivision (a)(1) provides for the admission of acts of "domestic violence" in a prosecution for "an offense involving

domestic violence . . . ." Evidence Code section 1109, subdivision (a)(3) then provides for the admission of acts of "child abuse" in a prosecution for "an offense involving child abuse . . . ." However, Evidence Code section 1109 does not explicitly provide for the admission of acts of domestic violence in a prosecution for an offense involving child abuse, nor vice versa.

Defendant argues that he was charged only with child abuse, not domestic violence, and therefore evidence of acts of domestic violence was not admissible under Evidence Code section 1109. The People respond that, because the purpose of Evidence Code section 1109 is to admit propensity evidence, and because "[t]he propensity to commit violence, whether on a partner, or upon a child, is the same," evidence of acts of either type of abuse should be admissible in a prosecution for the other. They do not explain, however, how Evidence Code section 1109 can be read to bring about this result.

Evidence Code section 1109 provides: "'Domestic violence' has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in Section 6211 of the Family Code, if the act occurred no more than five years before the charged offense." (Evid. Code, § 1109, subd. (d)(3).)

Taking Penal Code section 13700 first, it defines domestic violence as "abuse committed against an adult or a minor who is a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship." (Pen. Code, § 13700, subd. (b).)

For purposes of Penal Code section 273.5, which defines the crime of inflicting corporal injury on a cohabitant, "cohabitants" have been defined as "those '"living together in a substantial relationship — one manifested, minimally, by permanence and sexual or amorous intimacy."' [Citation.]" (*People v. Taylor* (2004) 118 Cal.App.4th 11, 18, quoting *People v. Moore* (1996) 44 Cal.App.4th 1323, 1333, quoting *People v. Holifield* (1988) 205 Cal.App.3d 993, 1000.) We may assume, without deciding, that "cohabitant" has the same meaning in Penal Code section 13700. If so, then the baby was not defendant's "cohabitant," and therefore defendant was not charged with an offense involving "domestic violence" under this definition.

Family Code section 6211, however, defines domestic violence more broadly as including abuse committed against either "[a] cohabitant or former cohabitant, as defined in Section 6209," (Fam. Code, § 6211, subd. (b)) or "[a] child of a party" (Fam. Code, § 6211, subd. (e)). Once again, we may assume, without deciding, that because the baby was not defendant's own child, he was not the child of a party. This time, however, we cannot just assume that "cohabitant" has the definition established in case law. Rather, Family Code section 6211 expressly incorporates the following definition in Family Code section 6209: "'Cohabitant' means a person who regularly resides in the household." (See also *Dunn v. Superior Court* (1993) 21 Cal.App.4th 721, 727 ["the Legislature has used the term differently in various contexts, sometimes to connote living together as husband and wife, and sometimes to connote simply living together"]; *People v. Siravo* (1993) 17 Cal.App.4th 555, 561 ["'"[c]ohabitation means simply to live or dwell together in the same habitation; evidence of lack of sexual relations is

irrelevant"'"].) The baby regularly resided in defendant's household. Accordingly, in this action, defendant was charged with an offense involving "domestic violence" within the meaning of Family Code section 6211.

Defendant points out, however, that Evidence Code section 1109 incorporates the definition in Family Code section 6211 subject to two qualifications — (1) "if the act occurred no more than five years before the charged offense," (2) and "[s]ubject to a hearing conducted pursuant to Section 352 . . . ." (Evid. Code, § 1109, subd. (d)(3).) These qualifications seem designed to apply to the type of *evidence* that is made admissible ("evidence of the defendant's commission of other domestic violence"), but not to the type of *prosecution* in which it is made admissible ("a criminal action in which the defendant is accused of an offense involving domestic violence"). (*Id.*, subd. (a)(1).) Defendant concludes that the Legislature must have intended the definition to apply to the former, but not to the latter.

We disagree. First of all, it would be somewhat bizarre for "domestic violence" to mean something different from "*other* domestic violence," particularly when used in the same sentence. Moreover, precisely *because* the two qualifications are designed to apply to the type of evidence, they do not meaningfully limit the type of prosecution. By definition, the charged offense cannot have occurred "more than five years before the charged offense"; accordingly, this criterion will always be satisfied. Similarly, the prosecution's discretion to charge a defendant with an offense involving domestic violence is not "[s]ubject to . . . [Evidence Code] Section 352"; accordingly, making the definition subject to Evidence Code section 352 has no effect.

This conclusion finds support in the legislative history. Evidence Code section 1109, as originally enacted in 1996, merely provided: "As used in this section, 'domestic violence' has the meaning set forth in Section 13700 of the Penal Code." (Former Evid. Code, § 1109, subd. (d), Stats. 1996, ch. 261, § 2, p. 1796.) In 2004, Assemblymember Cohn introduced Assembly Bill No. 141. The Assembly initially passed a version of this bill that simply provided: "As used in this section, 'domestic violence' has the meaning set forth in *Section 6211 of the Family Code or* Section 13700 of the Penal Code." (Assem. Amend. to Assem. Bill No. 141 (2003-2004 Reg. Sess.) Apr. 23, 2003.[10])

A committee analysis explained that the preexisting version of Evidence Code section 1109 used "the definition of domestic violence in Penal Code section 13700 . . . . This definition includes only violence against a spouse, former spouse, cohabitant, former cohabitant, or person with whom the suspect has had a child or is having or has had a dating or engagement relationship. AB 141 would instead amend the exception to include domestic violence as defined in Family Code section 6211, which includes violence against any child of a party. The bill will facilitate the prosecution of domestic violence by allowing in propensity evidence *in the prosecution of cases of domestic violence against children*, and by allowing evidence of a defendant's prior commission of domestic violence against a child to be used in appropriate domestic violence

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10 Available at <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0101-0150/ab_141_bill_20030423_amended_asm.html>, as of July 8, 2008.

prosecutions." (Assem. Com. On Judiciary, Analysis of Assem. Bill No. 141 (2003-2004 Reg. Sess.) as amended Apr. 23, 2003, pp. 1-2.[11])

In a Senate committee vote, however, the bill failed to pass. (Assem. Bill No. 141 (2003-2004 Reg. Sess.) Complete Bill History.[12]) The author therefore amended it so as to provide: "As used in this section, 'domestic violence' has the meaning set forth in Section 13700 of the Penal Code. *Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in Section 6211 of the Family Code.*" (Sen. Amend. to Assem. Bill No. 141 (2003-2004 Reg. Sess.) May 13, 2004.[13])

The Senate committee amended it further so as to provide: "As used in this section, 'domestic violence' has the meaning set forth in Section 13700 of the Penal Code. Subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, 'domestic violence' has the further meaning as set forth in Section 6211 of the Family Code *if the act occurred no more than five years before the charged offense*." (Sen. Amend. to Assem. Bill No. 141 (2003-2004 Reg. Sess.) June 9, 2004.[14])

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11 Available at <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0101-0150/ab_141_cfa_20030508_104335_asm_comm.html>, as of July 8, 2008.

12 Available at <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0101-0150/ab_141_bill_20040706_history.html>, as of July 8, 2008.

13 Available at <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0101-0150/ab_141_bill_20040513_amended_sen.html>, as of July 8, 2008.

14 Available at <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0101-0150/ab_141_bill_20040609_amended_sen.html>, as of July 8, 2008.

A subsequent third reading analysis demonstrates that the only intent behind the amendments was "to make the bill's proposed expansion of the definition of 'domestic violence' *for purposes of propensity evidence* . . . expressly subject to a section 352 hearing, which would be required to include corroboration and remoteness in time . . . ." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 141 (2003-2004 Reg. Sess.) as amended June 9, 2004, p. 2, italics added.[15]) However, there is no indication that the amendments were intended to narrow the proposed expansion of the class of cases in which such evidence would be admissible. To the contrary, the analysis stated that intent behind the bill as a whole was still to *change* "current law, [under which] propensity evidence is admissible during sexual assault, elder or dependant adult and domestic violence prosecutions, *but not as to child abuse*." (*Id*. at p. 3, italics added.)

Similarly, a subsequent Assembly analysis stated that using the "broader definition" of domestic violence in Family Code section 6211 "will have two effects. First, and most important, *prosecutors will be able to use propensity evidence in the prosecution of child abuse cases*. . . . Second, in any domestic violence case, the prosecutor will be able to bring in relevant evidence of prior violence against children." (Concurrence in Sen. Amends., Assem. Bill No. 141 (2003-2004 Reg. Sess.) as amended

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[15] Available at <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0101-0150/ab_141_cfa_20040609_135509_sen_floor.html>, as of July 8, 2008.

June 9, 2004, p. 4.[16]) We therefore conclude that, under Evidence Code section 1109, subdivision (d)(3), the definition of domestic violence in Family Code section 6211 can apply not only to the type of evidence admissible under Evidence Code section 1109, subdivision (a)(1), but also to the type of prosecution in which such evidence is admissible.

Defendant relies on subsequent legislative history regarding Assembly Bill No. 114 (2005-2006 Reg. Sess.), which added subdivision (a)(3) to Evidence Code section 1109. (See part II.C, *ante*.) As he points out, the author of this bill originally proposed to make acts of domestic violence cross-admissible in a prosecution for child abuse. (Assem. Bill No. 114 (2005-2006 Reg. Sess.) as introduced Jan. 12, 2005.[17]) Before the bill was passed, however, this provision was eliminated. (See Sen. Amend. to Assem. Bill No. 114 (2005-2006 Reg. Sess.) June 27, 2005.[18]) Defendant concludes that the Legislature intended that evidence of domestic violence *not* be cross-admissible in child abuse cases.

It is by no means clear that this is why the Legislature eliminated the provision for cross-admissibility. An earlier analysis of the bill had asked: "Is This Bill Necessary? Inasmuch as children are specified victims of domestic violence under the Family Code

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16 Available at <http://www.leginfo.ca.gov/pub/03-04/bill/asm/ab_0101-0150/ab_141_cfa_20040616_165158_asm_floor.html>, as of July 8, 2008.

17 Available at <http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0101-0150/ab_114_bill_20050112_introduced.html>, as of July 8, 2008.

18 Available at <http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0101-0150/ab_114_bill_20050627_amended_sen.html>, as of July 8, 2008.

and since [Evidence] Code Section 1109 already provides that evidence of a defendant's commission of other domestic violence is not made inadmissible in a prosecution for domestic violence subject to an evidentiary determination by the court pursuant to Evidence Code Section 352, supra, is this bill necessary?" (Assem. Com. on Public Safety, Analysis of Assem. Bill No. 114 (2005-2006 Reg. Sess.) as amended March 8, 2005, pp. 5-6.[19]) Thus, the Legislature may have eliminated the cross-admissibility provision precisely because it agreed with our conclusion — that a prosecution for abuse of a child living in the defendant's household is "a criminal action in which the defendant is accused of an offense involving domestic violence" within the meaning of Evidence Code section 1109, subdivision (a)(1). (Cf. *Eastburn v. Regional Fire Protection Authority* (2003) 31 Cal.4th 1175, 1184 ["the failure of the Legislature to adopt [the] proposed amendments . . . could merely reflect a determination that such amendments were unnecessary because the law already so provided"].)

In any event, "'[w]e can rarely determine from the failure of the Legislature to pass a particular bill what the intent of the Legislature is with respect to existing law.' [Citation.]" (*People v. Mendoza* (2000) 23 Cal.4th 896, 921-922, fn. omitted, quoting *Ingersoll v. Palmer* (1987) 43 Cal.3d 1321, 1349.) "[W]hen the Legislature amends a bill to add a provision, and then deletes that provision in a subsequent version of the bill, this failure to enact the provision is of little assistance in determining the intent of the

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[19] Available at <http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0101-0150/ab_114_cfa_20050314_100952_asm_comm.html>, as of July 8, 2008.

Legislature. [Citations.]" (*American Financial Services Assn. v. City of Oakland* (2005) 34 Cal.4th 1239, 1261-1262.)

We therefore conclude that the trial court did not err by admitting the evidence of prior acts of domestic violence.

E. *Admissibility of Prior Acts of Child Abuse in Connection with Count 2.*

Finally, defendant contends that, even assuming the prior acts of child abuse were properly admitted in connection with count 1, the trial court erred by allowing the jury to consider them in connection with count 2.

Evidence Code section 1109, subdivision (a)(3), by its terms, applies "in a criminal action in which the defendant is accused of an offense involving child abuse . . . ." "Child abuse," in this context, is defined as "an act proscribed by Section 273d of the Penal Code." (Evid. Code, § 1109, subd. (d)(2).)[20] In count 1, defendant was charged with violating Penal Code section 273d. In count 2, however, he was charged with violating Penal Code section 273a. Defendant therefore argues that the jury should not have been allowed to consider evidence of his prior acts of child abuse in connection with count 2.

This is an issue, first and foremost, of statutory interpretation. In Evidence Code section 1109, the Legislature specifically referred to a "a criminal *action* . . . ." (Italics added.) An "action" embraces all of the counts (and other allegations) charged. If the

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[20] Defendant has never contended that any of the acts he was shown to have committed against J.S. did not qualify as child abuse within the meaning of Evidence Code section 1109, subdivision (a)(3). Any such contention has been forfeited.

Legislature had wanted to make the evidence admissible only in connection with a particular count, it could have said so. In fact, it said just the opposite.

There is an obvious practical problem with asking a jury to limit its consideration of certain evidence to just one of several counts in an action. Ordinarily, we presume that jurors can follow an instruction to do so; however, there are times when the evidence is so potent or inflammatory that this presumption is overcome. The Legislature could reasonably choose to obviate the issue by providing that, whenever the evidence is admissible in connection with one count, it is admissible in connection with all counts, subject only to Evidence Code section 352. If the evidence is logically *relevant* to only one count, the defendant would be entitled to an instruction to that effect, on request. (Evid. Code, § 355.) Here, however, the evidence was logically relevant to both counts.

We therefore conclude that the trial court properly allowed the jury to consider evidence of defendant's prior acts of child abuse in connection with count 2 as well as count 1.

III

SUFFICIENCY OF THE EVIDENCE

Defendant also raises several contentions generally having to do with the sufficiency of the evidence.

A. *Standard of Review*.

"'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."'

[Citation.] 'Substantial evidence' is evidence which is '"reasonable in nature, credible, and of solid value."' [Citation.]" (*People v. Morgan* (2007) 42 Cal.4th 593, 613-614, quoting *People v. Davis* (1995) 10 Cal.4th 463, 509 and *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

"'The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Rundle* (2008) 43 Cal.App.4th 76, 137, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Hence, "'[a]n appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. [Citation.]' [Citation.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419, quoting *People v. Combs* (2004) 34 Cal.4th 821, 849.)

B. *The Sufficiency of the Evidence to Support Count 1*.

Defendant contends that there was insufficient evidence that he inflicted the baby's injuries, or, alternatively, that he did so willfully, to support his conviction on count 1.

Count 1 charged felony infliction of an injury on a child. This crime can be committed by, among other things, "willfully inflict[ing] upon a child . . . an injury resulting in a traumatic condition . . . ." (Pen. Code, § 273d, subd. (a).) "'. . . For the purposes of the statute, traumatic condition has been defined as a wound or other abnormal bodily condition resulting from the application of some external force. [Citation.]'" (*People v. Thomas* (1976) 65 Cal.App.3d 854, 857, quoting *People v. Stewart* (1961) 188 Cal.App.2d 88, 91.) "[T]he word wil[l]fully 'implies simply a

purpose or willingness to commit the act or to make the omission in question.' . . . There need not be found a deliberate intent to cause a traumatic condition, but only the more general intent to inflict upon a child any . . . injury." (*People v. Atkins* (1975) 53 Cal.App.3d 348, 358.)

The baby was injured while in defendant's care. Defendant places great weight on the fact that Dr. Kaufhold could not specify precisely when the injuries were inflicted. On the night of August 5-6, however, defendant himself sent Jessie an emergency page; when she responded, he told her the baby was hurt. By the time Jessie got home, she could see swelling on the baby's head. She checked for bruising around his eyes and ears, but did not see any; the next day, however, she did notice bruising in the baby's ears. Moreover, that same night, Padilla heard the baby crying. It was reasonably inferable that the baby was injured that night, while Jessie was out at the casino.

Dr. Kaufhold testified that bilateral skull fractures require either a "high velocity impact[], such as in an auto accident or fall from a greater height," or "a crush force, such as an automobile rollover [or] a head being caught in a vi[s]e of some kind . . . ." In a household environment, then, the only way the baby could have sustained this kind of injury would be if something heavy fell on him, or if defendant, either deliberately or accidentally, applied force to his head.

Defendant explained that K.P. attacked the baby with a toy airplane; there was substantial evidence, however, that this was not true. "[F]alse statements by a defendant are admissible to demonstrate consciousness of guilt. [Citation.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 335, fn. omitted.) Consciousness of guilt is, in turn, evidence of

guilt. While it is theoretically possible that defendant did not cause the injuries — or, if he did cause them, that he did not do so willfully — one would expect him, in either event, to have promptly volunteered a truthful explanation. Defendant also resisted getting medical care for the baby, which was further evidence of consciousness of guilt.

In addition, as we held in part II, *ante*, evidence was properly admitted that defendant had committed prior acts of child abuse against J.S. and prior acts of domestic violence against Crystal S. Because these acts involved the willful infliction of physical abuse, it was fairly inferable that defendant also willfully inflicted physical abuse on the baby.

Finally, the baby had a number of older bruises. In the weeks leading up to the incident, he appeared to be afraid of defendant. This suggests that defendant was injuring the baby repeatedly; it is fairly inferable that he did so willfully.

We therefore conclude that there was sufficient evidence to support defendant's conviction of felony infliction of an injury on a child under count 1.

C. *The Sufficiency of the Evidence to Support Count 2.*

Next, defendant contends that there was insufficient evidence of circumstances likely to produce death or great bodily harm to support his conviction on count 2.

Count 2 charged felony child abuse. Child abuse that would otherwise be a wobbler (Pen. Code, § 273a, subd. (b)) can be elevated to a felony if it is committed "under circumstances or conditions likely to produce great bodily harm or death . . . ." (Pen. Code, § 273a, subd. (a).) "Great bodily [harm] is bodily injury which is significant or substantial, not insignificant, trivial or moderate. [Citations.]" (*People v. McDaniel*

(2008) 159 Cal.App.4th 736, 748 [construing Pen. Code, § 245, subd. (a)].) In this case, the jury was so instructed. (CALJIC No. 9.37.)

Dr. Kaufhold testified that the skull fractures were "long fractures that went down the side of the head." The one on the right side ran "all the way along the side of the [parietal] bone"[21] and resulted in "massive" swelling. While not every broken bone necessarily constitutes great bodily injury (*People v. Nava* (1989) 207 Cal.App.3d 1490, 1495-1497), the two skull fractures in this case cannot be said to be "insignificant" or "trivial." Thus, they constituted great bodily injury as a matter of law. (See *People v. Johnson* (1980) 104 Cal.App.3d 598, 609 [fractured jaw].)

In addition, Dr. Kaufhold testified that the baby's injuries resulted from either a "high velocity impact[]" or "a crush force . . . ." As we held in part III.B, *ante*, there was substantial evidence that defendant willfully applied this force to the baby's head willfully. Given the degree of force used, and given that it did, in fact, result in great bodily harm, the jury could reasonably conclude that the crime was committed under circumstances likely to produce great bodily harm.

Defendant further contends, however, that even if there was sufficient evidence of circumstances likely to produce death or great bodily harm, there was also sufficient evidence of circumstances *not* likely to produce death or great bodily harm; accordingly,

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[21] X-rays, a CT scan, and a diagram of the baby's injuries were all admitted as exhibits. Neither side, however, has asked to have these exhibits transmitted to us. (See Cal. Rules of Court, rule 8.224.)

the trial court erred by failing to instruct on the lesser included offense of misdemeanor child abuse.

"'A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, "'that is, evidence that a reasonable jury could find persuasive'" [citation], which, if accepted, "'would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*" [citation].' [Citation.]" (*People v. Licas* (2007) 41 Cal.4th 362, 366, quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1218.) Here, despite sustaining an injury that legally constituted great bodily harm, the baby evidently remained conscious, did not cry or fuss, and recovered fully. There was neither any eyewitness testimony nor any physical evidence to indicate precisely how the baby's injuries were inflicted. The jury was forced to reason backward, from the fact that defendant lied about how they were inflicted, to the conclusion that defendant personally and willfully inflicted them; there was no other evidence of the circumstances under which he did so. It is at least theoretically possible to produce great bodily injury by using force that is not *likely* to produce great bodily injury. (*People v. Ausbie* (2004) 123 Cal.App.4th 855, 862.) Accordingly, a jury could reasonably have found that defendant was guilty of misdemeanor child abuse but not guilty of felony child abuse. It follows that the trial court erred by failing to instruct on misdemeanor child abuse.

We turn, then, to whether this error was prejudicial. "'The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818, at pages 836-837[, 299 P.2d 243]. Reversal is required only if it is reasonably probable the jury would have returned

a different verdict absent the error or errors complained of. [Citations.]' [Citations.]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1267, quoting *People v. Rogers* (2006) 39 Cal.4th 826, 867-868.) We know that this jury also found defendant guilty of felony infliction of an injury on a child (Pen. Code, § 273d, subd. (a)), which required that he inflict the injury willfully. Moreover, it found true an enhancement for personally inflicting great bodily injury on a child under five. (Pen. Code, § 12022.7, subd. (d).) Hence, it was, in fact, convinced, beyond a reasonable doubt, that defendant inflicted the injuries personally as well as willfully. The degree of force that he had to have applied, when coupled with the obvious vulnerability of a nine-month-old baby, was powerful evidence of circumstances in which great bodily injury or death was likely to result. Accordingly, we see no reasonable probability that this jury, even if it had been properly instructed, it would have found defendant guilty of misdemeanor child abuse rather than felony child abuse.

We therefore conclude that the failure to instruct on misdemeanor child abuse was harmless.

D. *The Sufficiency of the Evidence to Support the Great Bodily Injury Enhancements.*

Finally, defendant contends that there was insufficient evidence that he personally inflicted great bodily injury to support the enhancements to count 1 and count 2 for personally inflicting great bodily injury. (Pen. Code, § 12022.7, subd. (a).)

In part III.B, *ante*, we concluded that there was sufficient evidence that defendant personally inflicted the baby's injuries. In part III.C, *ante*, we further concluded that

there was sufficient evidence that the baby's injuries constituted great bodily injury. Accordingly, for the reasons we have already stated, we further conclude that there was sufficient evidence to support the enhancements.

IV

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

RICHLI
Acting P.J.

We concur:

GAUT
J.

MILLER
J.